ARIPIN BIN MOKHTAR & ANOR

v.

LEISURE DEVELOPMENT SDN. BHD. & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
DATO' V.C. GEORGE J.
[ORIGINATING SUMMONS NO.D3-24-188 OF 1994]
28 SEPTEMBER 1994

COMPANY LAW: *Section 162 Companies Act 1965 - Application for rectification of company register to enter names of plaintiffs as shareholders - Shares delivered by 2nd defendant to 3rd party for safekeeping together with blank memorandum of transfer and undated letter of renunciation - Letter declaring shares held on behalf of unnamed addressee and providing undertaking to transfer shares as directed by addressee - 1st defendant refusing to enter plaintiffs into register of members upon presentation of share certificates and memorandum of transfer - Defendants contending that the terms on which shares were left with the 3rd party made purported transfer to plaintiffs improper - Whether relevant.*

This was an originating summons seeking rectification of the register of the 1st defendant company to enter the names of the plaintiffs as shareholders pursuant to s.162 of the Companies Act 1965.

On 10 December 1991 the 2nd defendant delivered to Yeoh Tiong Lay & Sons Holdings Sdn. Bhd. (YTL) for "safekeeping" 1,250,000 shares in the 1st defendant company together with a duly executed blank memorandum of transfer and a letter of renunciation. The letter of renunciation was undated and declared that the shares were held for and on behalf of the unnamed addressee with an undertaking that the 2nd defendant would transfer the shares as directed by the addressee. On or about 22 February 1994 the plaintiffs presented the share certificates and the said memorandum of transfer to the 1st defendant requesting their names be entered in the register of members and on the same date the plaintiffs informed the 2nd defendant by letter that they had acted on the basis of the 2nd defendant's undertaking. By letter dated 26 February 1994 the 2nd defendant *inter alia* denied the plaintiffs entitlement as transferees of the shares and informed them that the board of directors had rejected their request to transfer which rejection was subsequently confirmed by the company secretary.

Plaintiffs' Counsel submitted that as shares are personal property to be transacted at the will of the holder, restrictions if any in respect of such transfers in the articles of association should be read restrictively. Furthermore, it was submitted that the directors had acted *ultra vires* in rejecting the plaintiffs' request as by article 40, the directors could only decline to register shares if they were not fully paid up or if the company had a lien on the shares which was not the case here. Defendants' Counsel contended that the terms on which the shares were left with YTL made the purported transfer to the plaintiffs improper.

The issue before the Court was whether the terms or basis on which the shares were left with YTL, of which there were several versions, were relevant.

Held:

(1) If there is on the face of it a *bona fide* contention of impropriety in respect of the transfers, the board is obliged not to ignore it and if satisfied that there was impropriety, whether it amounts to fraud or not, are entitled to reject the transfer. That is a basic obligation and an inherent right. Here the sufficient cause referred to in s.162 for the omission from the register of the plaintiffs' name, is the alleged knowledge on the part of the directors of the dispute in respect of the validity of the memorandum of transfer in that it is contended that it was prematurely and improperly submitted.

(2) In the instant case, there are a number of disputed facts resulting in a host of questions of fact and of law to be adjudicated on. The summary procedure provided by s.162 is wholly unsuitable for the case. Therefore the application is dismissed with costs with liberty to the plaintiffs to seek relief by way of a writ of summons.

[Application dismissed with costs]

For the plaintiff - C.V. Das; M/s. Shouk Lin & Bok
For the defendant - Nitin Nadkarni; M/s. Lee Hishamuddin

JUDGMENT

V.C. George J:

The 1,250,000 shares in the first defendant company, the subject of this s. 162 Companies Act 1965 application together with a duly executed blank memorandum of transfer and what has been referred to as a letter of renunciation in respect of them, were delivered by the 2nd defendant on or about 10 December 1991 to Yeoh Tiong Lay & Sons Holdings Sdn. Bhd. (YTL) for "safekeeping" according to the letter with which they were enclosed. The so called letter of renunciation by the 2nd defendant is undated and had provided in it space for the name of the addressee and declares that the shares are held for and on behalf of the addressee and has an undertaking that when called upon from time to time by the addressee the 2nd defendant would transfer such of those shares required by the addressee to be transferred and as directed by the addressee. There is nothing *per se* in the letter to suggest who the addressee is, the space for the name of the addressee having been left blank.

The plaintiffs had on or about 22 February 1994 presented to the company the share certificate in respect of the shares and the said memorandum of transfer (but now not in blank anymore because the plaintiffs' names had been inserted therein as transferees), with a request that their names be entered into the register of members as members in respect of the shares. They had also at the same time by letter dated 22 February 1994 informed the 2nd defendant transferor that they had done this on the basis of "Your undertaking to act upon our instructions to transfer the 1,250,000 shares in Leisure Development Sdn. Bhd. as we shall direct". It would appear that the plaintiffs were holding out that they were meant to be the addressee in the letter of renunciation.

The 2nd defendant was one of the two members of the board of directors of the 1st defendant. He replied the plaintiffs letter to him of 22 February 1994 by a letter dated 26 February 1994 *inter alia* denying that they were meant to be or were entitled to be transferees of the shares. He informed them that the board had rejected the request for the transfer to be effected.

By a letter dated 4 March 1991 the company secretary of the 1st defendant also wrote to the plaintiffs, informing them of the rejection by the board of their application to be registered as shareholders "after taking into account various factors deemed necessary and relevant by it".

The plaintiffs have by this originating summons invoked s.162 of the Companies Act 1965 and seek rectification of the register by having their names entered therein as shareholders in respect of the said shares.

Now article 40 of the articles of association of the 1st defendant company is as follows:

> 40. The directors may decline to register the transfer of any share (not being a fully paid share) and may also decline to register the transfer of any share on which the company has a lien.

The submissions of Encik C.V. Das of Counsel for the plaintiffs in respect of this, in effect, is that as shares are personal property to be transacted at the will of the holder,restrictions if any in respect of such transfers in the articles of association, should be read restrictively. Consistent with such

a rule, unexpected restrictions should not be read into the articles. By the terms of the said article 40, it is submitted that the directors can only decline to register the transferee if the shares are not fully paid up or if the company has a lien on the shares. It is submitted that whether the directors approve of the proposed transferee is not relevant because they do not have the power to disapprove of them. In the instant case the directors acted *ultra vires* their powers when they rejected the application to enter the name of the plaintiffs as transferees of the shares as the shares are fully paid up and the Company does not have a lien on them.

For the defendant it is contended that the terms or basis on which the shares were left with YTL makes the purported transfer of the shares to the plaintiffs improper. To this, it is contended on behalf of the plaintiffs, neither the Company when the memorandum of transfer was presented to it nor the Court now, should be concerned with the alleged terms or basis on which the shares were given to YTL.

The first issue for adjudication is whether the terms or the basis on which the shares were left with YTL is relevant, to which the terms or basis have to be looked at. There appears to be a number of versions in respect of this. In referring to the various versions I draw particular attention to some of the key words therein by underlining them.

Yeoh Seok Kah a director of YTL by his affidavit enclosure (13) says at para 5(3) with reference to the documents sent to YTL with the letter of 10 December 1991:

> YTL had also obtained from the 2nd defendant an undertaking to **hold the said shares in trust for its Malay Partners**. The undertaking is evidenced by the deposit of share certificate, transfer forms and trust deed.

This does not suggest that there is to be a sale of the shares to the Malay partners.

It was also Yeoh Seok Kah who signed YTL's letter of 7 March 1994 to the 2nd defendant which refers to the 2nd defendant's "**undertaking to hold the shares on our behalf** and to transfer them to **whomsoever** that we may direct". This version seems to widen the scope of the trust from "Malay partners" to "whomsoever....."

A third version of the basis on which the shares were held by YTL is given by the 2nd plaintiff in his affidavit enclosure (12) at para 6(2) (i):

> (the shares) would be held by the 2nd defendant in his name on a general trust until YTL's Malay business partners could acquire the shares.

The connotation appears to be that the Malay business partners would purchase the shares. He goes on to say in effect that the 2nd defendant was to examine the possibility of having "degazetted" certain land that had been gazetted Malay reservation land that YTL and the defendants were developing as a hotel complex in Langkawi and if "degazetting" was not possible YTL was entitled to "**bring in** Malay business partners".

According to Yeoh Seok Kah, as stated in enclosure (13) 6(3), the plaintiffs have **purchased** the shares from YTL.

The 2nd defendant's version of the basis on which the shares were deposited with YTL is set out in enclosure (9) subparagraph (a) to (c) of para 7 in which YTL is referred to as YTLH:

> (a) YTLH and /or YTLC would finance the construction of a sufficient portion of the Langkawi project, including payment of the land premium for the acquisition of the Langkawi land, **until such time** as the Langkawi project would be **able to sustain itself and generate sufficient funds to settle** financing given by them;

(b) in consideration of this, **upon completion** of the entire Langkawi project, YTLH would be entitled to receive 1, 250,000 shares in the 1st defendant which **they would hold through their Malay nominees**;

(c) in the **meantime**, **as security**, at their request I deposited with YTLH share certificates representing 1,250,000 shares in the 1st defendant together with blank transfer forms. I stress that the reason that the shares were not immediately transferred into the name of the Malay nominees of YTLH was that they were only entitled to the beneficial ownership of the shares **after fulfillment of all** their abovestated obligations.

I agree with Encik Nadkarni that one thing is clear, that both parties say that there is something more to the terms on which the shares were held by YTL than is set out in the letter of deposit of 10 December 1991 and in the undated letter of renunciation.

I pause to note that the 2nd defendant's version that YTL will "finance the construction of a sufficient position ..... until such time as the ..... project would be able to sustain itself etc" could suffer various consequences from a lack of certainty.

But if there is anything at all in the 2nd defendant's version it would seem that YTL had prematurely and improperly arranged for the shares to be transfered to the plaintiffs. Now, shares in a private company are chattels - *Givan, Rees v. Green*. [1966] 1 WLR 1378. One class of bailment is a pledge of chattels - **Halsbury** Vol. 2 para 1502. The 2nd defendant in effect suggests that the shares were pledged to be held until the fulfillment of the obligation on the part of the 2nd defendant to transfer the shares but that the obligation to do so would only arise on completion of the project. The bailee is precluded from using the bailed chattel for his own personal advantage. If he deals with the chattels entrusted to him in a way unauthorised by the bailor, he takes upon himself the risk of so doing. If the bailor without necessity and without the bailor's consent, express or implied, sells the chattels, an action for conversion will lie against him - **Halsbury** Vol.2 para 1518/1519.

Encik C.V. Das contends that nothing turns on there being these various versions. In his submission as the shares were fully paid shares and were not subject to a lien by the company, the board of directors had no choice in the terms of article 40 of the articles of association of the company but to register the plaintiffs as owners of the shares when the share certificate and the memorandum of transfer in respect of it were submitted to the company. And because they had no choice he submits that the Court also should not look at the issue of title in this s. 162 application. However, although article 40 does not provide for it, there can be no doubt that if there is fraud, the directors are entitled to refuse to register. And I fail to see why that principle is not to be extended to other acts of impropriety.

In my judgment if there is on the face of it a *bona fide* contention of impropriety in respect of the transfers the board is obliged not to ignore it and if satisfied that there was impropriety, whether it amounts to fraud or not, are entitled to reject the transfer. That is a basic obligation and an inherent right. Here the sufficient cause referred to in s. 162, for the omission from the register of the plaintiff's name, is the alleged knowledge on the part of the directors of the dispute in respect of the validity of the memorandum of transfer in that it is contended that it was prematurely and improperly submitted.

In *Len Chee Omnibus Co. Ltd.* [1969] 2 M.L.J. 202 @ 203 Raja Azlan Shah pointed out that where the facts are complex and in dispute the Court will refuse to entertain the application and will leave the applicant to seek rectification in a regular action.

In my judgment, in the instant case, there are a number of disputed facts resulting in a host of questions of fact and of law to be adjudicated on. The summary procedure provided by s. 162 is wholly unsuitable for the case.

Having come to this conclusion I do not think that it is desireable that I express any opinion on the other issues raised which have to be recanvassed before another Court. The originating summons enclosure (21) is dismissed with costs with liberty to the plaintiffs to seek the relief they seek by way of a writ of summons.